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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 333

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & SAINT LOUIS RAILWAY COMPANY, who sue, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

REPLY BRIEF FOR APPELLANTS

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Appellees.

No. 333.

Appeal from the District Court of the United States for the Western District of Kentucky

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REPLY BRIEF FOR APPELLANTS

A detailed reply to the various contentions of appellees' brief would involve a repetition of much of our original brief, to which appellees' brief is their answer. We shall, therefore, call attention only in a general way to what we conceive to be the outstanding fallacies of the appellees' various positions. They rely upon four propositions which may be summarized briefly thus:

(1) That the movement in question is the *shipment of property* for which a tariff must be filed and charges made.

(2) That if not this, it is an *unlawful discrimination* because one not a railroad company that owns a private car must pay a tariff charge of 25 fares.

(3) That it is an unlawful *discrimination between pay passengers and pass passengers* for the latter to have a better class of service than the former.

(4) That "neither the Commission nor Congress has sanctioned the practice of transporting free the private or office cars of other carriers."

In the discussion of these four points by appellees there has been some overlapping. It is better, however, in the interest of clarity of thinking, to consider them separately, as they are obviously distinct from each other.

I

IS THIS A PROPERTY SHIPMENT?

At the outset we submit that question No. 1, stated in appellees' brief at page 2, is not accurate. Appellants do not claim that the statutory provision giving the carriers the right to grant personal passes of itself permits the free carriage of an office car. Our claim is that in view of the free pass provision, the other statutes, namely, those relating to tariffs and discrimination, do not forbid the free transportation of an office car when

occupied by pass holders. With this explanation, much of the appellees' brief on this subject is irrelevant.

Considerable space is consumed by appellees in the discussion of a proposition which we do not contest, namely, that if this is a property shipment in the ordinary meaning of the term as used in the statute, then a tariff should have been filed and a charge made. We freely admitted this in the original brief, and stated that if the court holds to this view that ends the case. We respectfully insist, however, that the practice of the appellants with reference to the movement of railroad office cars is very different from the shipment of property. If so, then it does not come within the inhibition of the statute. Appellees claim that the transaction under discussion is a mere shipment of property as freight on two theories: (1) that it is analogous to the shipment of a car from a factory or from a repair shop; and (2) that it is analogous to the handling of an individual private car for 25 fares.

1. The Ordinary Shipment of a Car Is Entirely Different

In the case of one railroad transporting for another a new car from the factory or an old car from a place of repair, the transaction is rightly treated as a shipment of freight, for which there are tariffs prescribing the proper charges. It obviously has the usual elements of an ordinary *property shipment*.

One of these is the fact that all cars thus offered for shipment must be transported by the carrying line; it has no choice in the matter. Another is that the car is empty and not serving as any sort of transportation facility. A third is that such a movement is made in a freight train. None of these, the constituent elements of a shipment of freight, inhere in the office car practice involved in this proceeding.

(1) In the case at bar the carrying line need not transport the office car of another railroad unless it chooses to do so; it is purely a matter of choice. It may grant or decline the request at its pleasure, and, of course, in reaching its conclusion it may take into consideration any facts deemed relevant, such, for example, as its need of such equipment for the purpose of transporting these pass passengers, or its expectation to receive a like service in return, or the particular business relations with the owning line.

(2) Furthermore, the car is definitely used for performing a transportation service, for it carries a passenger or a number of passengers, who are none the less passengers because they hold free transportation. The obligation to carry these is one which, by express permission of the statute, it is authorized to assume. In order to meet this obligation it must furnish the facility necessary to transport such pass-holding persons, whether railroad officials or their families, or both. At this juncture the owning line offers to furnish the necessary equipment for carrying these passengers. There may be many of them, so that the use

of the car thus furnished might easily be of greater value than the mere cost of hauling it. That detail, however, is not important in determining the legal question as to whether the carrying line's movement of the car thus placed in its passenger train, and carrying passengers, is the same as the ordinary shipment of an empty car for which, under the statute, a charge must be made. There is no statutory requirement as to rental or other consideration. It is sufficient that the consideration for this carrying arrangement is satisfactory to the parties, provided the agreement is in good faith, and this is not questioned anywhere in the record.

(3) In the ordinary shipment of a car it is handled as *freight* in a *freight train;* whereas the movement here complained of is a *passenger* movement handled in a *passenger train.* This distinction between the two conditions is a clear one.

Obviously the movement of an empty passenger car in a *freight train* as a freight shipment is so different from the movement of a passenger car in a *passenger train* when *occupied by passengers* that a statute strictly applying to the former cannot by mere analogy be made to apply to the latter.

(4) The true status of the office car in the practice under consideration is that of a transportation facility in use as such. A car, being a physical thing of value, is of course *property* in the broad sense of that term, but the Commission (R. 32-34) and counsel admit that cars of one carrier are frequently transported by another carrier *without*

being considered property for which freight charges must be paid, the distinguishing feature being that if the carrying line gets transportation service from the movement, the car thus becomes (as stated by the Commission in *Furnas Ice Cream Co. v. Norfolk & Western Ry. Co.,* 157 I. C. C. 617) not "an *article* of commerce, but rather as an *instrument* of commerce." That is just what occurs here. The carrying line, moreover, by using it as such, is relieved of furnishing equipment for the transportation of those who occupy the office car. There are always a number of these passengers, the official usually having his secretary, his assistant, and often the heads of departments, experts, etc.; or he may be taking a vacation trip with his wife, dependent children and servants—a perfectly legitimate thing, which is so recognized and authorized by Congress. In either case the facility—the office car furnished by the owning line and accepted by the carrying line—is taken into the latter's passenger train, becomes *its own* under the law as repeatedly declared by the courts (our Br. p. 24), and serves to leave to the carrying line the use of space in its own equipment which but for this arrangement would be occupied by these passengers. While it is primarily for the greater convenience of the owning line's officials, it is none the less a facility used by the carrying line for transporting some of its passengers.

To illustrate the soundness of this position, take the case, say, of a group of Louisville & Nashville employes going, as often happens, from Louisville, Ky., to French Lick Springs, Ind., on a Saturday

afternoon to spend the week-end at this popular resort. It is a day run of about two hours. The passengers number 25 or 30—enough to reasonably fill a coach—and all have passes. Can it be contended, where the Louisville & Nashville furnishes a coach for carrying these persons and thus saves the Monon Railroad from furnishing its own car, that it should pay the Monon a tariff charge of 25 fares for moving the car under those circumstances? Aside from such a contention being utterly unreasonable, neither the Commission nor its counsel in this case present either statute or precedent to support it. Yet the case at bar is identical in principle, the difference being only one of degree.

The correctness of our position may be tested by another simple illustration. Suppose a carrier purchases a passenger car in Chicago for delivery at Louisville over the Pennsylvania Railroad. This would be a freight shipment carried in a *freight train*. For it there is a tariff and the Pennsylvania would have to charge the regular rate; not to do so would be a violation of the tariff and also the statute against discrimination if a charge is made in a similar case. But if the Pennsylvania chooses to put this car in its service in a *passenger train* from Chicago to Louisville, it can do so on whatever terms may be agreed upon between it and the owner of the car. Furthermore, it can do this for one company and decline to do it for the other, without violating any law, for the reason (as shown fully in our original brief, p. 17) that while Congress has given the Commission con-

trol over the interchange of *freight cars* between carriers (Section 1, paragraph 10 of the Interstate Commerce Act), it has withheld all such authority in the case of *passenger equipment*. This proposition, asserted and proven in our original brief, is not controverted in appellees' brief. And in the illustration given it is immaterial whether a fixed rental be paid by the Pennsylvania or it take chances on the revenue derived from the car being sufficient to justify the movement. Its acquiring this passenger equipment and placing it in its passenger train is solely "*a matter of private contract*," as clearly appears from the decisions of the Commission itself quoted in our original brief at the pages just indicated.

This distinction has been repeatedly recognized by the Commission itself, as for example in *Pacific Engineering & Construction Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 1 I. C. C. 340, where, in discussing this difference between cars as *articles of commerce* and as *instrumentalities of commerce*, the Commission said:

> "While it is the duty of all common carriers subject to the act to furnish suitable and adequate facilities for all reasonable necessities of the business in which they engage, the law at present leaves to carriers their own appropriate means of carriage. We consider [illegible] that are not common carriers of cars of their own, or perhaps employed solely as instruments of carriage, and may decline to accept them for such purposes in lieu of their own, although hired

to accept them when offered merely as articles to be transported."

In the *Worcester Excursion Car Case*, *Penn. R. R. v. Pitcairn* (1894) the leading case involving the status of passenger cars, uniformly followed ever since, the Commission said:

> "The statute has not relieved railroad companies from the duty of providing their own equipment, nor changed the method of providing it. They may do it by *construction*, by *purchase* or by *contract for their use*. But no one has a right to compel a railroad company to select among these modes or to *contract with all comers*. How cars shall be provided is entirely *matter of private contract*."

In the case at bar the Pullman car is taken into the carrying of a passenger train and thus becomes the car of the carrier. Thereupon, the *R. R. v. Pullman Car Co.* [illegible] and it performs a distinct passenger transportation service in carrying passengers which as shown above the line using it must otherwise have rendered in one of its own cars pursuant to the passenger tariffs for transportation, and as we have seen, this [illegible] means a number of points.

A person complaining the unjust discrimination of an Pullman car charges [illegible] a rate [illegible] more charges that would not charge the defendant as it would be [illegible] a necessary incident to the [illegible] of the car which [illegible] is engaged that generally there is no such thing as the movement of [illegible] car empty, and the practice is

a passenger train, when occupied by passengers, is a similar *freight* shipment.

It is in fact strictly a passenger movement and the freight tariffs for transporting property do not apply.

The truth is that, where the statute permits certain traffic to be treated exceptionally, the Commission by several of its Conference Rulings has held that it is not necessary for the carriers to have, file or publish tariffs in respect to it.

Reference is made to the following Conference Rulings:

> "33. Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without *filing or posting the schedule of such rates with the commission.*"
>
> "208 (e). Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibition at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This special provision and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 *it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations,*" etc.

"218. The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States Government, and *that the rates or fares so made need not be posted or filed with the Commission.* (See rulings 33 and 208e.)"

The Commission has announced the same principle in its decisions. In *United States v. Union Pacific R. R. Co.*, 28 I. C. C. 524, the Commission says, referring to section 22 of the Act:

"In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. The carriers may, and frequently do, avail of this right and *without tariff authorization,* but this Commission is not empowered to require carriers to grant to the United States free transportation or other rates or concessions than those afforded the general public."

Appellees' contention at page 17, that we are seeking to make "the application of the prohibitions in Section 6 of the Act against transporting property without publication of tariff charges" to depend "upon ownership of the property transported, or upon the individual for whom the service is performed," is wholly without justification. We are making no such contention, but on the contrary insist that both these movements are *passen-*

ger movements and are not affected by the statute requiring the filing of tariffs for the *shipment of property*. In our view, if in order to perform a transportation service, which a carrier has lawfully contracted to perform free, it is able to secure a car not owned by another carrier, but privately owned, it would be entirely lawful to haul such car free. It would make the car its own for the purposes of performing its own contract for transportation. If all the occupants are passholders, the carrying line may lawfully, if it chooses, transport them in the car which they present, regardless of who may own it or what individuals holding passes compose the party. It is a misconception of our attitude to think that we contend for the proposition that ownership determines whether a charge for a car is to be imposed. On the contrary, we contend that a car, if used as a facility of transportation by a carrier in order to perform a lawful transportation service, may be hauled free, however owned.

In their brief appellees close their eyes to the undisputed fact that the office car is an actual facility of transportation in which passengers are carried who otherwise would occupy *pro tanto* the facilities of the carrying line. They insist that for an office car to become a transportation facility the carrying line must pay a rental for, and must be free to put its own passengers in, such car. In other words, they contend that the contract or arrangement must be of a certain, definite nature; whereas the decisions of both the Commission and the courts hold without a break in the line that

when one railroad procures a passenger car of another and places it in its passenger train, and puts passengers in it, the carrying line thereby makes the car "its own for the purpose of carriage." The decisions all hold that "how cars shall be provided is entirely a matter of private contract," *Worcester Excursion Car Co. v. Penn R. R. Co.*, 3 I. C. C. 584. As declared by the Commission in the same case:

> "Whatever discretion of *preference* a carrier may exercise in the *choice of passenger cars* in its business is *outside of the statute and only an exercise of legitimate authority.*"

As to appellees' contention that the passenger cars used by carriers shall have been acquired only in the way counsel regard as proper, we remind the court that the Commission in the last cited case also said:

> "Every company judges for itself what style of car it desires for its passengers, and *its reasons are unimportant* so long as its patrons are properly served, *nor is it material how the cars are procured.*"

Appellees cite no authority tending to support their contention. They refer to several cases but none is at all in point. Only two are really relied upon. One is *New York & New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361. Appellees' statement of this case at page 31 of their brief shows that the question was whether the Chesapeake & Ohio Railroad Company could transport coal which had been sold to the New York & New Haven at less than the published

freight rates. Being an *article of freight*, the court properly decided that coal could not be shipped to any one at other than tariff rates. The next case was *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 225 U. S. 326. There, also, was involved a shipment of coal, an *article of freight*, and the question was whether the carrying line could transport it for another railroad for less than the tariff charge exacted of other shippers because the coal was to be used for railroad fuel purposes. This, too, was obviously an ordinary freight service, and the court held that fuel coal must be supplied for all shippers alike.

The other cases referred to by appellees merely emphasize what we freely admit—that freight and passenger tariffs must be filed and obeyed. The summary of appellees' conclusions from these cases is thus stated at page 33 of their brief:

> "The decisions in the *New Haven case* and in the *B. & O. case* show that railroads can not be regarded as favored *shippers—exempted from the prohibitions of section 6.*"

As stated, we fully concur in this conclusion, but insist that the transaction herein involved is not a *shipment of freight* regulated by Section 6. Clearly the railroad company is not a "shipper" of its office car when another railroad company adopts it as its own passenger facility and attempts the task of performing what the Commission in the Worcester case, *supra*, describes as "so extraordinary, and to some extent, hazardous service as that of transporting passengers over its lines."

Appellees' argument, and practically their whole argument, is thus stated, beginning at the bottom of page 33:

> "The exception permitting interchange of passes for free transportation of certain persons can not be construed to permit also of free transportation of a whole private car for the passholder; that is, it can not be construed to exempt the transportation of the car from the requirements of Section 6 as to publication and observance of tariff charges on the ground that it is to be transported for an individual entitled to a personal pass."

Again we assert that appellants make no such claim. The only requirements of "Section 6 as to publication and observance of tariff charges" as to property are those relating to shipments of *property as freight,* which we have heretofore undertaken to show is not involved in the office car practice under discussion.

Nor do appellants claim that a pass entitles the holder to the "free transportation of a whole private car" or any other property. Very few holders of passes are transported in private cars, even for their own company, and none can demand it. In each instance it is a matter of individual selection of means by the carrying line, the fact that the proposed occupants hold passes being a mere incident, although an important one in carrying out the arrangement. *The efficacy of the pass lies solely in the fact that its holder is put by the statute into a special class wholly different from the general public.* The result is that he may lawfully

be transported free while all others must pay. This is a discrimination, of course, but a lawful one because the statute expressly makes it so. What is the result? The carrying line is not bound, in its treatment of the pass-holders, by the tariff rules that apply to other passengers who must be charged for their transportation and required to pay the same fares and receive the same accommodations. Those, however, of the excepted class may be transported without charge, and, as the Commission practically admits, as to every vehicle except a foreign owned office car, in any vehicle the carrying line sees fit to furnish them—a coach, a Pullman seat, a Pullman drawing-room, or any of the carrying line's own private cars.

It is proper to state here that as a matter of convenience in designating at whose instance an office car would be handled there was a practice (*approved by the Commission and expressly prescribed by its own Pass Regulations*) of issuing what was called a "car pass," which authorized the handling of a car. The form thus prescribed by the Commission is as follows:

> "Pass John Smith, *car*, and five officers and employees. Account President, officers, and employees of X.Y.Z.Ry." (R. 60.)

This action of the Commission did not purport to rest on any express authorization contained in the statute, but was its authentic interpretation of the various statutes to the effect that where one had the right to free transportation there was no law which forbade the carrying line giving him

any sort of accommodation which it desired to give. This particular feature will be considered further *infra* (p. 34).

The prohibition as to discrimination having been removed, there remains the single question as to whether the carrying line, instead of putting a group of these excepted persons into one of its own private cars, can transport them in an office car owned by another railroad, provided the latter is willing to furnish it and the carrying line to accept it. This, of course, follows if it is lawful for the carrying line to acquire from another railroad a car for this purpose.

We submit that this acquisition and use of the owning line's car by the carrying line as a part of the latter's equipment for the time being is as proper and lawful as if a fixed rental, large or small, or any other consideration, had induced the arrangement. We have shown (our brief, p. 17) that Congress has given the Commission jurisdiction over *freight cars* but has withheld it over passenger cars. Since then, there is no denial by appellees that the Commission has no control over passenger cars, and that a carrier can use its own discretion in procuring them by private contract, there is obviously no lawful objection to this practice provided it is not, as we think has been conclusively shown, the shipment of property. Furthermore, where is there, morally or ethically, any injustice or injury done by this voluntary arrangement which is satisfactory to the two principals concerned? Obviously the arrangement is a mutually beneficial one or it would not have been

maintained so consistently and constantly from the beginning of railroads, nearly one hundred years ago, to the present time, and there has never been any objection from any source, so far as we have been able to learn, until this proceeding by the Commission upon its own motion.

We call attention to the appellees' argument at page 30 of their brief, by which they try to show that our course of reasoning would permit the carrying line to transport free the car of a [illegible] passenger on the theory that the carrying line could thereby make the car its own facility of transportation. They say:

> "And yet, if such use as is made by a foreign road of the private car of another carrier, in accepting it for transportation along with an official entitled to a personal pass, makes the car its facility of transportation, equally it would seem that, if a 'privately owned car' were accepted for transportation along with the holder of a single ticket, it would no longer be 'property' subject to transportation charges because it had become the carrier's facility of transportation."

The fallacy of this argument is patent, for the carrying line could not accept from a passenger holding a ticket his car under a contract to give him the exclusive use of it, for such a contract would clearly amount to a contract to make an unlawful discrimination between that ticket holder and other ticket holders. The car if accepted and used for transportation purposes would still not be "property" shipped, but it

II

ALLEGED DISCRIMINATION BECAUSE OF THE PRIVATELY OWNED CAR TARIFF OF TWENTY FIVE FARES.

As shown by the analysis of appellees' argument, given *supra* (p. 2), there are two claims of discrimination. They are entirely distinct from each other and should not be confused. The first, and the only one considered or passed upon by the Commission, relates to the privately owned car tariff of 25 fares. The second, which was initiated by the lower court, grows out of the fact that this practice affords to a pass-holder better accommodations than those furnished to a ticket-holder.

this second point in reality not being in the case, for the reason that the Commission made no finding on the subject. (See our Brief, p. 82, *et seq.*) We here consider these in their order.

The Commission in the proceeding herein reviewed held that the office car practice was a discrimination against those who are transported in a privately owned car since the latter are required to pay 2½ fares for such movement in accordance with the regularly adopted and published tariff. This question is discussed at length in our original brief (pp. 64-81) where we think it was demonstrated that no unlawful discrimination arose out of the handling free of an office car occupied by persons entitled to and holding free transportation.

Whether a given transaction is an unlawful discrimination or preference depends upon the *statute*, for such a discrimination is *malum prohibitum* and not *malum in se*. The only two statutes involved are section 2 and paragraph one of section 3 of the Interstate Commerce Act, both of which are set out in appellees' brief at pages 5 and 6. Section 2 condemns inequality of treatment in the transportation of both persons and property and in the transmission of intelligence only where there is involved "the transportation or transmission of a kind of traffic or message under *substantially similar circumstances and conditions.*" In only such a case does the statute declare that "such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." This obviously

does not apply to the case we are discussing because the transportation of a privately owned car for 25 fares is wholly dissimilar from the transportation in an office car of a group of passengers who hold free transportation. In the former case there may be as many as 25 passengers in the privately owned car, and the 25 fares required to be paid by the tariff obviously would be paid for the transportation of those 25 persons in exclusive occupation of a car. In such a case obviously *nothing would be paid for the car.* The conditions and circumstances of this transaction are altogether unlike those of the transportation of an office car containing persons entitled to and holding free transportation, for *nothing need be paid for the transportation of those persons.* It would be difficult to imagine two situations more unlike, since in one car transportation charges would have to be paid for *all the occupants,* while in the other all the occupants were traveling *free.* Obviously the two cases are not comparable, and therefore a comparison between them does not come within the application of the statute. Furthermore, the inherent unreasonableness of trying to put them in the same class at once appears, for if this were done the result would be that the occupants, who may be 25 in number, of the privately owned car will pay simply the ordinary transportation rates which anybody else would pay, and nothing for the car; *whereas the occupants of the office car, who are entitled to free transportation, would be paying 25 fares for the movement of the mere car itself.*

As to paragraph (1) of Section 3 of the Act, it

is obvious that so far as it relates to transportation movements they were *revenue movements* subject to the same *tariff provisions.* The differences we have noted above in describing the two movements in question apply here and show conclusively that the movement of a railroad office car and that of an ordinary private car, not being the same class, do not involve discrimination. In the one case the contract is to carry a person in accordance with the carrier's tariff, viz., 25 fares, if the occupants are to enjoy the exclusive use of their own private car, regardless of the number up to 25—the larger rate per capita where there are less than 25 being abundantly justified by the exclusive privileges granted. In the other case the contract was to carry persons entitled to *free transportation* in some facility which the carrying line must provide, but no particular facility may be demanded. The important point is that those passengers are to be carried free, and whether the carrying line should select one of its own office cars or an office car of the company employing those persons, or owned by some other person, is not a circumstance of moment. The fundamental difference is that one group is carried free of charge and the other group must pay for their transportation.

It is claimed, however, by appellees that the Commission having found that this is a discrimination, that finding cannot be reviewed by the courts. This position is not sound. As shown in our original brief (p. 65 *et seq.*), it is well established that the courts will review and reverse the Commission's finding if it is *not supported by any*

evidence. We admit that if this *lawful discrimination* were used for an *unlawful purpose* the Commission could find it to be unlawful discrimination, but there is not a scintilla of evidence in the record, and no such evidence is claimed by appellees, tending to show that this lawful discrimination is for an unlawful purpose or has an unlawful result. The facts are set out in the Commission's report, and these are simply that pass-holders are transported in an office car without payment of any compensation, whereas the occupants of a privately owned car pay 25 fares. This presents, therefore, merely the naked question of law as to whether these uncontroverted facts constitute an unlawful discrimination forbidden by the Interstate Commerce Act.

This Court said, in *Florida v. United States and I. C. C.,* decided January 5, 1931, in dealing with the question of discrimination as to rates:

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce the question is one of the relation of rates to each other."

thus indicating that there must be a rate for each of the transactions, not a rate for one and a free pass for another.

It might have added that unjust discrimination, as to rates, consists in giving different rates to those entitled to the same rates or rates bearing a proper relation to each other; and that, as to practices, unjust discrimination consists in making differences between those entitled to the same treat-

ment. If the law does not entitle two persons to the same treatment, it makes no difference how great the difference in treatment is. This is but a corollary from the principle that, in order for there to be unjust discrimination between two persons, they must belong to the same class. When the law permits differences in treatment between them they do not belong to the same class, the law having assigned them to different classes, and the law establishes no standard of what the differences in treatment between these two classes may be.

The exigencies of the appellees' case apparently coerce them to attach legal importance to the fact that the "practice" of the carriers is to permit exclusive occupancy of the foreign owned car to the pass passengers, and the argument is apparently made that the alleged fact as to "practice" constitutes a conversion of the movement from a facility of transportation to the shipment of property and that the alleged practice constitutes an unjust discrimination against the person paying the twenty-five-fare passenger charge.

As to the first of these contentions, namely, that the alleged exclusive occupancy by a pass-holder of a car converts the movement from a transportation facility to a shipment of property, it must be noted that the practice, whatever it is, cannot change the inherent character of the service. The movement of the car in order to carry the passenger is inherently a transportation service, and the movement cannot be changed from a facility for transportation service to a shipment of property.

Moreover, it is not sound in law to contend that the pass passenger has a right to demand exclusive use of the car. It is not obligatory upon the moving carrier to accept the car at all. If it consents to do so, it may, as a matter of law, attach such conditions as it sees fit, even to the extent of saying that it shall not be exclusively occupied by the pass passenger.

Moreover, we submit that there is no legal obligation on the carrier handling the car not to put an occupant or occupants in it if it sees proper. Doubtless it is done many times. If the President of a railroad—of the carrying line or of some other company not the owner of the car—happened to be traveling in the direction in which the car was going, there would, we imagine, be no hesitancy in accommodating him in the foreign owned car. We submit that it would be within the lawful power of the carrier moving the car to do so if it saw fit.

The fact that it may, as a matter of courtesy, not put other passengers in the car, does not in any way affect the inherent character of the service or convert a transportation facility into the shipment of property.

As to the second of the above mentioned contentions, namely, that to permit a pass passenger the exclusive occupancy of the car constitutes unjust discrimination, we submit that this suggestion is fully answered by the considerations hereinbefore presented. The law permits any treatment in favor of passengers who may, under the law, travel free, and they may be treated differently

from other classes of passengers. As above stated, when the law permits difference in treatment between persons, they do not belong to the same class and there is no limit set by the law as to what the difference in treatment between the two classes may be.

III

ALLEGED DISCRIMINATION BETWEEN PAY PASSENGERS AND PASS PASSENGERS

This subject we discussed at pages 82 *et seq.*, of our original brief. This was the sole basis of the lower court's decision, its contention being that under the Interstate Commerce Act a carrier *could not lawfully furnish to the holder of free transportation any better accommodations than those afforded to a pay passenger.* The Commission not only made no such finding, but did not even suggest such a question. The effort in appellees' brief to show from the Commission's opinion that it did undertake to pass on this particular kind of discrimination is clearly not justified by anything to be found in that opinion or in the record and is utterly inconsistent with the statement made in the same brief at page 14 as to just what the Commission did find. No pertinent authority was presented either by the lower court or by the learned counsel for the appellees in their brief in support of any such position. The contention is ineffective for any purpose for two reasons.

In the first place, the court *has no right to initiate a finding of discrimination.* That is en-

trusted by the law initially to the Interstate Commerce Commission, and the court's power is limited to determining whether the Commission's finding is or is not lawful. Here the Commission found unlawful discrimination, but only as between the movement free of an office car occupied by pass-holders and the movement of a privately owned car occupied by pay passengers who were required to pay 25 fares. Because, therefore, this new form of discrimination relied upon by the lower court was never considered or passed upon by the Commission, we insist, for the reasons set out in our original brief (p. 83), that the court was wholly without power to consider or pass upon any such alleged discrimination and this aspect of alleged unlawful discrimination is not involved in the case. (Our original brief, pp. 82-84).

In the next place, even if the court could have properly considered this phase of the case (which we deny), its finding was unlawful and wholly unsupported by any evidence. Here, as in the case of the alleged discrimination against the occupants of a privately owned car, the question depends upon the application to the facts of sections 2 and 3 of the Interstate Commerce Act, both of which have been discussed in the preceding section. Here, as in the other instance, it would be difficult to find two classes more unlike in a transportation transaction than a pay passenger and a pass passenger. The boldest and most pronounced discrimination imaginable already exists between the two, but as shown in the former discussion, this discrimination, however extreme, is lawful because

it is expressly permitted by the statute. Starting with that premise, obviously the two classes are in no sense comparable. The meaning of the statute is that all *pay passengers* must, as among themselves, receive equality of treatment, both as to charges and service. They are equally bound by the tariff provisions, and because of those provisions every one in the class can and must receive just what the tariffs provide for—nothing less and nothing more. Free passengers, however, do not come within the tariff provisions at all. They are distinctly excepted therefrom by those provisions of the statute which authorize them to have free transportation. The purpose and effect of these excepting statutes is aptly stated by this court in *Nashville &c. Ry. v. Tennessee*, 262 U. S. 318, 323.

There the court, after drawing the distinction between the use of free or reduced transportation for a lawful purpose and for an unlawful purpose, subsequently states that the object of the statute is to permit "the preferential treatment of certain classes of shippers and travelers." In this connection the court said:

> "Section 22 must in this matter, as in others, be read in connection *with the rest of the act, and be interpreted with due regard to its manifest purpose. Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511. Congress did not intend, by this provision concerning *reduced rates and free transportation,* to create an *instrument,* by which the carrier was authorized, in its discretion, *to subject interstate commerce to undue prejudice,* or by which the State was empowered to compel the carriers so to do. The object of the section

was *to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited.* And in this respect its provisions are illustrative, not exclusive. It *limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act.* By so doing, *it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases.*"

It is in this connection that this court in *Postal Telegraph Co. v. Tonopah & T. W. R. Co.,* 248 U. S., at page 471, said:

> "Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. *The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute.*"

Since there is nothing in the statute that even squints at the necessity of a carrier confining the accommodations furnished a pass passenger to those furnished a coach passenger, it follows that it may furnish any sort of transportation which it is prepared to give. No reason can be shown why it should not have this right. All that a pay passenger can require is that he have just what the tariffs prescribe for him and that nobody in his class has better. He occupies no such relation to

a pass passenger. From time immemorial the carrier has elected to give to the free passenger whatever service it desired to give—to some it gives the right to ride in the coach free, to others the better position of a seat in a parlor car of its own, to others it gives the use of a Pullman drawing-room (for which it will be remembered it is entitled to a part of the fare known as the surcharge), whereas pay passengers in addition to the Pullman charge must pay *two fares.* This practice has never been questioned, but if the novel suggestion upon which the lower court rested its decision (that a free passenger must be limited to the accommodations furnished a coach passenger), this universal custom would have to be abandoned; and yet there is no reason for abandoning it. Why should not the carrier, having different classes of accommodations, have the right to decide what should be the extent of its gratuity to those holding free transportation? It is true that in anticipation of this argument the lower court, in justification of its rule, said that the difference between the service rendered in the coach and that in the drawing-room of a Pullman car is not enough to constitute an undue discrimination, but obviously such position is untenable since the difference is very marked. But the lower court's opinion itself furnished a still stronger argument against its soundness in its glaring inconsistency in holding that a railroad company *upon its own line* could properly and lawfully carry pass passengers not only in the Pullman but in one of *its own private cars* (R. 107). Its consistency is not relieved by the quali-

fying phrase, "when they are engaged in the duties of their employment," for the statute makes no distinction based upon the purpose for which an officer or employee is travelling. In other words, a lawyer paying his fare could ride in a coach, whereas a minister of religion holding free transportation could be carried in the railroad company's private car. A moment's reflection will show that so far as this difference of treatment between the two passengers is concerned it is immaterial whether the preferred passenger is riding in a car owned by the *carrying line* or in *one of its own cars.* To the public the distinction is just as great, and if it be an unlawful discrimination it is just as extreme in the one case as in the other.

In conclusion of this subject of discrimination we wish to state that the appellees are mistaken in certain observations made at pages 45 and 47 of their brief, wherein they seem to state the appellants' view to be that

> "the passengers involved must be of the same class in the narrow sense of being engaged in competitive commercial travel."

We have nowhere assumed or countenanced such a position. Their references to pages 73 and 74 of our brief do not even tend to support such an interpretation of our attitude. On the contrary, in concluding the discussion of the Nashville case at page 74 we said:

> "Stated in another way, the alleged discrimination is not between members of the same class. The public is divided by the Act in two

classes, revenue passengers and pass passengers, and difference in the treatment of these two separate classes in respect to the movement of the cars which they occupy cannot in itself constitute unlawful discrimination."

IV

APPELLEES CONTEND THAT "NEITHER THE COMMISSION NOR CONGRESS HAS SANCTIONED THE PRACTICE OF TRANSPORTING FREE THE PRIVATE OR OFFICE CARS OF OTHER CARRIERS"

This has been fully discussed in our original brief. There seems to be little difference between counsel and ourselves as to the fundamental principles of law upon which appellees rely in presenting this phase of their argument. Its force is sought to be avoided by the appellees upon the two-fold claim (1) that the Commission has never "sanctioned the practice of transporting free" these office cars, and (2) that if it had, such sanction would not be of force because the statute is not ambiguous.

The ground upon which appellees assert the first of these propositions is the fact that the Commission has never actually decided a case involving the legality of this practice. That is not necessary.

A late case upon the question is the decision of Chief Justice Taft in the case of *Wisconsin v. Illinois,* 278 U. S. 367, 413 (1929). The question there presented was the proper interpretation of an Act of Congress, section 10 of its Act of March 3, 1899, which prohibited the creation of an ob-

struction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States. This was construed as authorizing the Secretary of War, upon the recommendation of the Chief of Engineers, to determine what obstructions could be placed in navigable waters. It was contended that this construction was wrong and that only Congress could do this. It seems that the construction just mentioned had been acted upon by the Government officials continuously from a short time after the passage of the Act. Accordingly, this practical construction, because used by the War Department for a long time, was accepted by the Supreme Court as the true construction of the statute, the Chief Justice, at page 413, saying:

> "This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. *Nothing is more convincing in interpretation of a doubtful or ambiguous statute. United States v. Minnesota,* 270 U. S. 181, 205; *Swending v. Washington Water Power Co.*, 265 U. S. 322, 331; *Kern River Co. v. United States,* 257 U. S. 147, 154; *United States v. Burlington & Missouri River R. R.*, 98 U. S. 334, 341; *United States v. Hammers,* 221 U. S. 220, 228; *Logan v. Davis,* 233 U. S. 613, 627."

The Secretary of War was not a judicial officer. It does not appear that he had held hearings and had deliberately made a construction of the statute, but the uniform practice of the War Department for nearly thirty years was construed to be a binding interpretation.

No hearing and deliberate decision, as contended for by the appellees, is necessary in order for the Commission to make an interpretation of the statute which they are administering. A sustained and long continued course of administrative interpretation is sufficient.

Counsel for defendants in the court below presented the argument that even if the Commission has for forty years construed the law as permitting the hauling free of a car owned by another company, when used as a transportation facility to carry a passenger lawfully entitled to use, and using, free transportation, it can now change its mind and thus destroy the force and effect of its administrative interpretation of the law over this long period of time.

The Commission cannot do this for two reasons: First, because the real question is what the court will regard as the administrative ruling of the Commission, and that ruling, under the authorities, is the contemporaneous and long continued administrative interpretation of the law—not a sudden and abrupt change, for some reason, of an administrative policy; in other words, while the Commission may change its mind, it cannot change the law, and the law had been established by its contemporaneous and long continued interpretation before it suddenly changed its mind; and, second, because the change now made by the Commission, after forty years of administering the law under a different interpretation, is clearly wrong, as shown by the authorities cited in our original brief.

The Commission is an administrative body, its function being the general supervision and regulation of the transportation activities of railroad companies. It gave tacit recognition of the lawfulness of its practice during all of these years and after it had full knowledge of the nature of the practice, through its consideration of this practice in the *Tap Line case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494, and the *Five Per Cent case*, 31 I. C. C. 351, 410, all of which are fully discussed in our brief at pages 45 *et seq.* But it did more than tacitly recognize it for in its Pass Regulations discussed at pages 49, *et seq.*, of our brief, it not only clearly and definitely recognized the propriety of this practice, but expressly prescribed just how a carrier was to proceed in the matter of hauling without charge the car of another when appropriately occupied.

The other ground of appellees' contention is equally fallacious. They simply insist that the statutes are not ambiguous and hence that this age-old rule of construction does not apply. The statute here under consideration is not a single one but is a combination of the pertinent ones. We believe that we have successfully shown that taking these statutes as a whole, that is, those relating to free transportation, to the filing of tariffs, and to discriminations, the holders of free transportation are so exempted from their operation that they occupy an entirely different position and constitute an entirely different class from the general public. But if we are wrong in this, certainly the appellees are in no position to claim that the

statute is not at least ambiguous in view of the fact that, as shown in our original brief, beginning at p. 45, the Commission itself for a period of forty-two years has construed the statutes to mean the exact contrary of what it now claims is their meaning. While we insist that the statutes are perfectly clear and mean what the Commission construed them to mean over this long period of forty-two years, still if there is any doubt about it, the rule of statutory interpretation which we have invoked, to the effect that the courts will accept the long continued administrative interpretation by the body charged with the administration of the law, clearly applies and is conclusive in favor of the appellants' view. This is strengthened by the subsequent enactment of the statutes by Congress without change.

Respectfully submitted,

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